

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 September 2007

BALCA No.: 2007-INA-00030
ETA Case No.: D-05110-63142

In the Matter of:

SILVERSMITH LLC,
Employer,

on behalf of

WIESLAWA ZANIEWSKA,
Alien.

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center

Appearances: David M. Fredman, Owner
*Pro Se for the Employer*¹

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of

¹ Jan Sperry appeared as the agent of the Employer and the Alien before the Certifying Officer. The appeal, however, was taken by Mr. Fredman acting pro se.

the Code of Federal Regulations (“C.F.R.”).² We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file (“AF”), and any written arguments. 20 C.F.R. § 656.27(c).

BACKGROUND

The Employer submitted this application for permanent alien labor certification for the position of Executive Housekeeper. (AF 84). The CO issued a Notice of Findings (“NOF”) on April 28, 2006, stating the intent to deny the application based on four grounds, two of which were later successfully rebutted. One of the grounds for denial still at issue is that existence of the Employer could not be verified. The CO could not find the business in any database or telephone directory. Also, documents the Employer had submitted in response to a February 15, 2006 Recruitment Report Instruction Letter³ did not contain the same name as the business listed on the ETA 750. Thus, the CO could not determine whether a *bona fide* job opportunity actually existed. (AF 59). The other ground for denial still at issue is that the Employer did not show that it had made a *bona fide* job recruitment by properly contacting the U.S. applicants that had applied for the job and rejecting them for lawful, job-related reasons. (AF 60). The CO required the Employer to rebut these findings by providing documentation.

The Employer submitted a rebuttal to the CO’s NOF on May 31, 2006. In the rebuttal the Employer stated that Silversmith LLC, the employer listed on the submitted ETA Form 750, was the owner and operator of the Crowne Plaza, the business name that had appeared on the previously submitted documents (and where the Alien was to

² This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

³ This Letter was issued by the Dallas Backlog Elimination Center by a TR 07 Analyst. (AF 65-66). The Letter was issued to provide the Employer with resumes of three qualified U.S. applicants who expressed an interest in the position, and to inform the Employer that it must provide the office with a written report of its recruitment efforts of these applicants. In a report submitted March 28, 2006, the Employer stated that it had contacted the applicants by telephone and that the applicants were no longer interested. (AF 64).

actually work). (AF 51). The Employer also admitted that it did not have documentation of any of the recruitment efforts it made of U.S. applicants. (AF 49).

On March 29, 2007, the CO issued a Final Determination denying the application. The CO found that the Employer failed to provide any of the documentation requested in the NOF which would verify its existence. (AF 47). The Employer also did not provide any proof that it had contacted the U.S. applicants in good faith and rejected them solely for lawful job-related reasons. (AF 48).

On May 1, 2007 the Employer submitted a request for review, attaching thereto copies of its two most recent tax returns and an itemized telephone bill. (AF 1-45).

In response to the Employer's request for review, the CO forwarded the matter to this Board on June 1, 2007. The Board issued a Notice of Docketing on June 21, 2007. No briefs or statements of position were received.

DISCUSSION

The Employer submitted copies of its 2005 and 2006 tax returns and an itemized telephone bill with its request for review. These submitted documents are beyond the authority of this Board to consider. The regulation at 20 C.F.R. § 656.27(c), concerning review on the record by the Board states that the Board "shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made." The regulation also states that the Board will take into account "the request for review, and any Statements of Position or legal briefs submitted." However, 20 C.F.R. §656.26(b)(4) states that the "request for review, statements briefs and other submissions of the parties ... shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." These regulations exclude the possibility of presenting new evidence before the Board. Thus, this panel may only examine that evidence which the CO reviewed and based the denial decisions on. See Import S.H.K. Enterprises, Inc., 1988-INA-52 (Feb. 21, 1989)(en

banc). Thus, the documents that the Employer submitted with its request for review cannot be taken into consideration by this Board.

Upon consideration of the evidence before the CO, we find that the Employer did not prove its existence. To rebut this finding, the CO directed the Employer in the NOF to submit a copy of its most recent business tax return; copies of the last four quarterly reports filed with the State for unemployment insurance; a list of each employee with job title and annual wage; and, if the business entity is connected as a “DBA [doing business as],” provide an “Article of Business” to show that the business entities are the same as one. (AF 59). The Employer failed to submit any such documentation with its rebuttal.⁴ See Gencorp., 1987-INA-659 (Jan. 13, 1989)(en banc) (if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it). Thus, because the existence of the Employer cannot be verified, it cannot be determined if a *bona fide* job opportunity exists.

The Employer also failed to prove that it completed the recruitment of U.S. applicants in good faith. Recruitment in good faith is regulated by 20 C.F.R. § 656.20(c)(8), which requires that the job opportunity has been and is clearly open to any qualified U.S. worker; and by 20 C.F.R. § 656.21(b)(6), which states that if U.S. workers have applied for the job, the employer must document that they were rejected solely for job-related reasons. The regulation at 20 C.F.R. § 656.1 states that the purpose of Part 656, under section 212(a)(5)(A) of the Immigration and Nationality Act (INA), is that certain aliens may not obtain a visa for permanent employment unless it is determined that “[t]here are not sufficient United States workers, who are able, willing, qualified and available at the time of application ... and at the place where the alien is to perform the work.”⁵

⁴ The Employer submitted a License Certificate with its rebuttal to the NOF (AF 56); however, on the certificate it states that the Crowne Plaza Chicago Metro is a DBA of Mid City Plaza LLC (the first word in the name appears to be “Mid” though it is not very legible), not Silversmith LLC. This document further places into question the existence of the Employer.

⁵ Although the regulations do not explicitly state a “good faith” requirement in regard to post-filing recruitment, such a good faith requirement is implicit. See H.C. LaMarche Enterprises, Inc., 1987-INA-607 (Oct. 27, 1988).

The burden is on the Employer to prove that it made a good faith recruitment effort and that there were no U.S. workers who were able, willing, qualified, or available for the job opportunity. In this matter, the Employer's recruitment report stated that it had contacted the U.S. applicants by telephone and that the applicants were no longer interested in the job opportunity (AF 64)(see n. 2, *supra*), but provided no proof for its statements. In the NOF, the CO asked for documentation from the Employer to prove that it had made a good faith recruitment effort and that the applicants were rejected because of lawful, job-related reasons. The CO stated that the Employer may do this by:

documenting further attempts to contact the referred applicants ... Such documentation may consist of, but is not limited to, evidence supporting certified mail or other documents of timely contact which would establish a good faith recruitment effort.

(AF 60). In its rebuttal to the NOF, the Employer merely stated that the applicants "were all contacted by phone. I regret that no proof is available other than this statement." (AF 49).⁶ The CO stated that "[a]n employer's statement of an applicant's rejection of a job offer alone is insufficient, unless supported by documentation." (AF 60). Mere assertions by the Employer do not suffice as evidence; it is the Employer's burden to prove that it made a good faith recruitment effort. See M.N. Auto Electric Corp., 2000-INA-165 (Aug. 8, 2001)(en banc). Since the Employer had no proof of its attempts to contact the applicants, it cannot be determined that the applicants were rejected solely for lawful, job-related reasons.

In sum, the Employer did not prove that it actually existed. Nor did it prove that it had conducted a good faith recruitment effort and rejected U.S. applicants solely on job-related reasons. Accordingly, we find that the CO properly denied certification.

⁶ In its rebuttal to the NOF, the Employer also stated that "[a]t the time the recruitment efforts were made, there were no specific instructions which directed that follow-up mailings be done." (AF 49). However, in the February 15, 2006 Recruitment Report Instruction Letter, it clearly states that the report submitted by the Employer must include "[d]ocumentation showing the attempt to contact each U.S. worker, which may be signed certified mail receipts, itemized phone bills or copies of emails." (AF 65).

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.